

PLAINTIFFS' SUMMARY JUDGMENT OPPOSITION

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CONSUMERS ENERGY COMPANY)	
and DTE ELECTRIC COMPANY,)	
)	Case No. 4:22-cv-10847
Plaintiffs,)	
)	Judge F. Kay Behm
v.)	
)	Mag. Judge Curtis Ivy, Jr.
TOSHIBA AMERICA ENERGY)	
SYSTEMS CORPORATION and)	
TOSHIBA CORPORATION,)	
)	
Defendants.)	

DECLARATION OF KRISTOPHER KOSTER

I, Kristopher Koster, hereby state and declare as follows:

My Background.

1. I am employed by Consumers Energy Company (“Consumers Energy”) as Project Manager on the Ludington Pumped Storage Plant Corrective Work Project. The Ludington Plant is jointly owned by Consumers Energy and DTE Electric Company (together, the “Utilities”).

2. I received a Bachelor’s Degree in Mechanical Engineering from Grand Valley State University in 2007. In 2010, I also obtained a Master’s Certificate in Project Management from George Washington University.

3. I first joined Consumers Energy as an intern in 2005, and was hired as a Project Engineer in 2008. In 2016, I began work on the Ludington Plant overhaul

project as a Project Engineer. The project was underway when I joined. As Project Engineer, I was responsible for providing engineering support to the Consumers Energy project team, supporting the Project Manager, and administering the 2010 Engineering Procurement & Construction Contract with TAES (the “Contract”). In 2017, I became a Project Manager, continuing to support the Ludington Plant overhaul in an assistant Project Manager role as well as serving as Project Manager for other projects.

4. In 2019, I took over the role of Project Manager for the Ludington Plant overhaul project. The role of the owner Project Manager includes monitoring work progress and execution, cost and schedule, and administration of the Contract.

TAES’s Defective And Incomplete Work On The Ludington Overhaul Project.

5. The Utilities have identified a number of defects in TAES’s work on the Ludington overhaul project. The most significant defects involve the discharge rings (“DRs”) and discharge ring extensions (“DREs”). The DRs and DREs are steel rings approximately 72 feet in circumference that are located near the bottom of each unit and that encircle the bottom of each unit’s runner. The DRs and DREs are an important part of the pressure boundary containing the flow of water within each unit’s water passageways.

6. Inspections conducted in fall 2019 identified that the DRs of Unit 4 and Unit 2 were deteriorating and exhibited various damage including pitting and material loss. At that time, Unit 4 and Unit 2 were under warranty in the Contract.

7. The Utilities issued two “Nonconformance Reports” (“NCRs”) to TAES describing the damage to the DRs. The Utilities used NCRs during the overhaul project to notify TAES of defects or other nonconformances.

8. Specifically, the Utilities issued NCR-00567 regarding the Unit 4 DR on September 13, 2019. A copy of the record for NCR-00567 is filed herewith as Exhibit A-1. The Utilities issued NCR-00575 regarding the Unit 2 DR on October 11, 2019. A copy of the record for NCR-00575 is filed herewith as Exhibit A-2.

9. The Utilities have inspected the Unit 2 and Unit 4 DRs approximately annually since 2019. The deterioration of the Unit 2 and Unit 4 DRs has continued to worsen each year. Both DRs now have large voids located where the DR meets the DRE that are as deep as the thickness of the DRE, exposing concrete and grout behind the DRE to water.

10. For a number of years, Unit 4 has been leaking water from an area above the draft tube door of that unit, which is located below the DR and DRE. The volume of leaking water has increased significantly over time. The Utilities have not identified any potential source of the growing leak other than the growing voids in the Unit 4 DR.

11. The Utilities have identified numerous other defects in TAES's work, which the Utilities also documented in NCRs. For example, during the fall of 2019, inspections identified cracking of the Unit 2 and Unit 5 DREs. The Utilities issued NCR-00576 and NCR-00577 regarding the DRE cracking on October 11, 2019. Copies of the records for NCR-00576 and NCR-00577 are filed herewith as Exhibits A-3 and A-4. The Utilities identified additional DRE cracking since 2019 and issued additional NCRs.

12. The Utilities have also identified defects involving other plant components such as the shaft seals and motor operated disconnect switches. The Utilities issued NCRs for all of these items. For example, the record for NCR-00564 related to the shaft seals is filed herewith as Exhibit A-5. In addition, the record for NCR-00607 related to the motor operated disconnect switches is filed herewith as Exhibit A-6.

13. In addition, TAES has not completed a number of items on the "punch lists" for Units 1, Unit 6, and Unit 3.

The Unsuccessful Dispute Resolution Process.

14. Throughout 2020 and 2021, the Utilities repeatedly asked TAES to address its defective and incomplete work through NCRs and other communications. However, TAES failed to provide meaningful remedy plans for review by the Utilities and failed to perform any permanent repairs.

15. On July 30, 2021, the Utilities sent TAES a notice invoking the formal dispute resolution process under the Contract provision GC9. In the notice, the Utilities asked TAES to provide a plan to address the defective and incomplete work set out in the NCRs and otherwise described in the letter. A copy of the July 30, 2021 notice is filed herewith as Exhibit A-7.

16. Following the July 30, 2021 notice, the Utilities had extensive correspondence and meetings with TAES regarding the problems with TAES's work. During those discussions, which I attended, TAES repeatedly assured the Utilities that it would provide a comprehensive plan to address the defects and problems the Utilities had raised. However, TAES never provided such a plan.

17. As one example, at a September 22, 2021 meeting between executives of Consumers Energy, TAES, and Toshiba Corporation, conducted as part of the dispute resolution process, TAES committed to provide a plan to address its defective and incomplete work by September 28, 2021. But all that TAES provided on September 28, 2021 was a summary of its prior responses, with no commitment or plan to address significant issues such as damage to the Unit 4 and Unit 2 DRs. A copy of TAES's September 28, 2021 letter is filed herewith as Exhibit A-8.

18. In an October 6, 2021 letter, the Utilities notified TAES that the 60-day dispute resolution process had expired without resolution of the dispute. A copy of the October 6, 2021 letter is filed herewith as Exhibit A-9.

19. In an October 14, 2021 response, TAES agreed that the dispute had not been resolved during the dispute resolution period. A copy of TAES's October 14, 2021 letter is filed herewith as Exhibit A-10.

The Utilities Invoke the Parent Guaranty; Toshiba Corporation Refuses To Act.

20. Following the failed dispute resolution process, on December 10, 2021, the Utilities sent a demand to TAES's parent, Toshiba Corporation, requesting performance of the Contract pursuant to Toshiba Corporation's parent guaranty. A copy of the demand letter is filed herewith as Exhibit A-11.

21. In a response dated December 23, 2021, Toshiba Corporation refused to take further action, claiming that its obligations under the guaranty were "suspended." Toshiba Corporation also stated that the expiration of the 60-day dispute period meant that "either party [may] avail itself of any process or means legally available." A copy of Toshiba Corporation's letter is filed herewith as Exhibit A-12.

22. Throughout this period, the Utilities continued to ask TAES to address its defective and incomplete work. As examples, letters on these issues dated November 4, 2021, January 13, 2022, and March 8, 2022 are filed herewith as

Exhibits A-13, A-14, and A-15. TAES did not provide a plan to address its defective and incomplete work.

The Utilities Provide TAES Another Warning And Then File Suit.

23. On April 6, 2022, the Utilities notified TAES that, absent a commitment to address all defective or incomplete work within ten business days, the Utilities would resort to their legal remedies. A copy of the April 6, 2022 letter is filed herewith as Exhibit A-16. TAES did not agree to address its defective and incomplete work.

24. On April 20, 2022, the Utilities filed their complaint in this case.

The Utilities Warn They Are Hiring A New Contractor.

25. In late 2022 and early 2023, as the Utilities prepared for outages of the Ludington units, I again invited TAES to use the outages as an opportunity to address its defective or incomplete work. TAES agreed to address some small issues, but refused to address or provide a plan for addressing any of the more significant defective components like the DRs. TAES even refused to inspect the DR/DREs during a Plant outage in spring 2023, arguing that it was “not necessary.” A copy of an email chain between TAES and me regarding the spring 2023 outage is filed herewith as Exhibit A-17.

26. On April 14, 2023 the Utilities notified TAES and Toshiba Corporation that, in light of their failure to remedy defective and incomplete work, the Utilities

had engaged other contractors to begin addressing those items. A copy of the Utilities' April 14, 2023 letter is filed herewith as Exhibit A-18.

27. On May 11, 2023, TAES sent a response. In that letter, TAES denied that components such as the DREs, shaft seals, and motor operated disconnects were defective or required repair. TAES further stated: "TAES' response is simple: TAES invites Owner, who instituted litigation, to litigate those contested 'damages.'" A copy of TAES' May 11, 2023 letter is filed herewith as Exhibit A-19.

The Utilities Engage Voith Hydro To Address TAES's Work.

28. In 2021 the Utilities engaged another hydroelectric contractor, Voith Hydro, to prepare contingency plans and ready themselves to serve as a backup to complete TAES's work on the final unit to be overhauled, Unit 3, because that unit was far behind schedule and it was not clear that TAES would complete it. TAES ultimately completed the Unit 3 work, two years late.

29. Given Toshiba's refusal to do so, the Utilities engaged Voith Hydro to make certain interim repairs to components during unit outages that occurred in the spring of 2023.

30. In the fall of 2023, in light of TAES's continued refusals, the Utilities engaged Voith Hydro to develop repair plans to address TAES's defective and incomplete work. That effort involved extensive engineering by Voith Hydro to

develop recommended repairs as well as to estimate expected costs and a schedule for implementation.

31. Voith Hydro's work developing proposals for corrective work continued through the rest of 2023 and into 2024. Over this period, Voith Hydro, with support from project staff at Consumers Energy, performed extensive engineering work on a repair plan. The Utilities paid Voith Hydro approximately \$3.6 million for its work developing those proposals and performing detailed engineering on certain components.

32. In spring 2024, Voith Hydro delivered detailed proposals supporting the Utilities' "Budgetary Scoping Documents" ("BSDs"). The BSDs were developed for several systems, and detailed the requirements of the Contract as well as deficiencies related to each system that were identified and needed to be addressed. Voith Hydro prepared repair plans, estimated the costs of the repair work, and provided a detailed schedule for undertaking repairs.

33. The Utilities worked with Voith Hydro to refine and finalize the scope of the corrective work proposed in the BSDs. In late 2024, the Utilities finalized "Scope of Work 5" with Voith Hydro, which authorized Voith Hydro to begin work on the proposed repairs.

34. The repairs authorized by Scope of Work 5 include addressing the damage to the DR of Unit 4 and Unit 2, as well as the replacement of the DRE of those units. Scope of Work 5 also authorizes Voith Hydro to perform repair work on other defective components such as the shaft seals of all of the units and to remedy other TAES defective and incomplete work.

35. As of the date of this declaration, Voith Hydro has commenced engineering, planning, and procurement efforts required to undertake the repairs authorized in Scope of Work 5. This includes commencement of fabrication for some components that require a longer lead time. All told, the effort to engage Voith Hydro to engineer and develop a repair plan and estimate, and to undertake the pre-repair fabrication of components and other preparations, has taken more than two years of significant work by the Utilities and Voith Hydro. Voith Hydro's efforts associated with Scope of Work 5 have already resulted in additional incurred costs to the Utilities exceeding \$9.2 million.

36. The Utilities continue to work closely with Voith Hydro through the engineering and planning efforts. The current schedule anticipates that an outage to complete repairs to Unit 4 will commence in 2026, with repair outages for other units to follow.

Termination Of The TAES Contract.

37. On October 22, 2024, in light of TAES's repeated refusal to address its defective and incomplete work, and in light of Voith Hydro's progress in developing a repair plan, the Utilities sent TAES a notice regarding termination of the Contract pursuant to section CG7(b)(ii). The notice identified several "Major Default[s]" by TAES under the Contract in relation to its defective work on components such as the DRs, the DREs, shaft seals, and motor operated disconnect switches. The notice also referred to the detailed NCRs that describe TAES's defective work and the voluminous additional correspondence between the parties concerning those items. A copy of that notice is filed herewith as Exhibit A-20.

38. In response, on October 31, 2024 TAES sent the Utilities, for the first time, a purported "corrective action and recovery plan." A copy of TAES's letter and purported plan is filed herewith as Exhibit A-21.

39. The Utilities evaluated the TAES purported plan, including with technical engineering personnel. The Utilities determined that the purported plan was incomplete, risky, and otherwise unacceptable. The Utilities sent TAES a letter on December 3, 2024 explaining in detail why the purported plan was unacceptable. The Utilities also confirmed in that letter that the Contract was terminated for default pursuant to section GC7(b). A copy of the Utilities' December 3, 2024 letter is filed herewith as Exhibit A-22.

40. Consumers Energy exchanged further correspondence with TAES regarding the termination on January 31, 2025 and March 13, 2025. Copies of those letters are filed herewith as Exhibits A-23 and A-24.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 17th day of April 2025



Kristopher Koster